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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1279

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR CO., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Automatic Radio Mfg. Co., Inc., and Automatic Radio Sales, Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered in this case on March 5, 1968.

OPINIONS BELOW

The opinion of the court of appeals on the judgment sought to be reviewed here (App. B, *infra*, pp. 14a-20a) is not yet reported. The findings and opinion of the district court (App. B, *infra*, pp. 4a-13a) are reported at 272 F.Supp. 744.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 21a) was entered on March 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in a private antitrust suit, the district court may deny an interlocutory injunction against overt tied selling practices begun by the defendant after the suit was filed, when these practices are forcing the plaintiffs out of a major and traditional market in which they have long competed with defendant and are giving the defendant a complete, unchallenged monopoly in that market.

STATUTES INVOLVED

The statutory provisions involved are sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and sections 3, 4, and 16 of the Clayton Act, 15 U.S.C. §§ 14, 15, and 26. They are printed in Appendix A, pp. 1a-3a.

STATEMENT

Petitioners are a long established manufacturer of automobile radios and its sales subsidiary. Their principal product lines are custom automobile radios, i.e. radios designed and adapted for in-dash mounting on a particular model of automobile. Their complaint, originally filed on April 26, 1963, charges Ford Motor Company with monopolizing and restraining trade in custom automobile radios and with unlawful tied selling thereof, in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 3 of the Clayton Act, 15 U.S.C. § 14. The complaint seeks treble damages and injunctive relief under sections

4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. On September 20, 1967, the Massachusetts Federal District Court denied the petitioners' motion for a preliminary injunction to maintain the status quo pendente lite against certain anticompetitive marketing practices initiated by the defendant after the complaint was filed (Appellants' Record Appendix, p. 55*). On March 5, 1968, the court of appeals affirmed that denial.

Petitioners pioneered the custom automobile radio field, designing and marketing custom radios for in-dash mounting in new cars. Subsequently the automobile manufacturers began to market such radios themselves, in competition with petitioners. Because most custom automobile radios are sold to buyers of new cars and are installed before the cars are delivered, petitioners' only significant markets for their custom car radios consist of franchised dealers in new automobiles (Appellants' RA 61). These markets are particularly susceptible to control and domination by the automobile manufacturers, each of which now sells car radios to the automobile dealers it franchises (Appellants' RA 62). While petitioners sell custom car radios to dealers franchised by each of the automobile manufacturers, Ford dealers are petitioners' largest single market and constitute their only significant market for their most important group of products, i.e. radios designed and adapted for custom installation in the Ford line of cars.

Petitioners assert that Ford is and has been for some years using its economic power over its automobile dealers to exclude petitioners and to obtain a

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* References to Appellants' Record Appendix to their court of appeals brief are hereinafter abbreviated as Appellants' RA.

monopoly in the sale of custom automobile radios to those dealers. Presently Ford's only competition on such sales is offered by petitioners and by another independent custom car radio manufacturer, Tenna Corporation of Cleveland, Ohio (Appellants' RA 64). Formerly this competition included Soundex Radio Corporation of Brockton, Massachusetts, but this company was bankrupted by the Ford marketing practices here in issue (Appellants' RA 65, 71).

Petitioners seek a preliminary injunction to preserve the status quo by restraining Ford from continuing a marketing practice, adopted by it after the suit was filed, which effectively compels its franchised dealers to obtain from Ford their requirements of custom radios for certain lines of cars, i.e., the practice of refusing to supply its dealers with those of its cars that are designed and adapted for custom radios unless the dealer orders the custom radio installed therein by Ford (Appellants' RA 55). This practice is seriously jeopardizing petitioners' own continued existence as competitors of Ford in the custom automobile radio field, is wholly excluding them from supplying custom radios for certain models of Ford-produced cars (Mercury and Custom Comet), and is substantially excluding them from supplying custom radios for other important models (Galaxie and Fairlane) (Appellants' RA 65, 68, 138). Similarly, the practice has excluded Tenna (Appellants' RA 69).

The injunction which the petitioners seek is a narrow one. In essence it would require Ford to furnish its dealers, when they so request, with the same automobile without factory-installed radio that the dealer would get from Ford had he ordered the automobile with a

factory-installed radio, namely an automobile ready, without modification, to receive a custom radio.

For many years, and until after this suit was filed, when an automobile was delivered by the automobile manufacturer to a dealer without a radio installed at the factory, the opening in the instrument panel designed to accommodate a radio was covered by a small piece of metal called a "knock-out plate." If the dealer wanted to install a radio, he simply removed the "knock-out plate" and installed the radio in the bared opening. However, in its 1965 Galaxie and Fairlane models first appearing in the fall of 1964, Ford placed a plastic cover about 27 inches wide over the entire instrument panel with holes in it for various dashboard gauges and instruments and, if a radio had been factory installed, for the dial, pushbuttons and knobs of the radio. For cars without factory-installed radios, the plastic dashboard cover was identical except that it had no holes for a radio. If a dealer wanted to install a radio, the entire dashboard cover had to be removed and replaced by one with holes in it for radio knobs and pushbuttons.

During the first seven months of the 1965 model year, Automatic Radio lost more than 70 percent of the business it had previously been doing in selling custom radios for Fairlane cars, and more than two-thirds of its business in selling radios for Galaxies (Appellants' RA 131, 138-139). At the same time, the number of Galaxies sold with factory-installed radios increased from 60.7 percent on 1964 models to 78.7 percent on 1965 models, and the number of Fairlanes with factory-installed radios increased from 56.0 percent to 70.2 percent, even though both figures had been declining dur-

ing the three preceding years. Accordingly, in 1965 petitioners sought, but were denied, a preliminary injunction against Ford's "practice of supplying to its dealers certain of its automobiles constructed without openings in the instrument panels for the installation of radios." (*Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 242 F. Supp. 852, 853 (D. Mass. 1965) (Appellants' RA 43)).

Since 1965 the anticompetitive impact of Ford's marketing practices upon petitioners has become more severe as they have been extended to additional lines of Ford's automobiles. On February 17, 1967, petitioners filed the preliminary injunction motion here in issue. For the immediate purposes of the present appeal, the sales practices in question are exemplified by Ford's marketing of its 1967 Galaxie, Fairlane, Deluxe Comet and Mercury models. Each of these models is offered to Ford dealers in two versions: one with an imperforate dashboard that will not accommodate a custom radio and the other with a dashboard designed and adapted to accommodate a custom radio. The version that will accommodate a custom radio is available to Ford dealers only when they buy a factory-installed radio from Ford. To remain in competition with Ford, petitioners have been obliged to have radio dashboards manufactured for them, so that they can be furnished free of charge to Ford dealers who buy petitioners' custom radios. Petitioners have not been able to obtain these dashboards, which are costly, in the first quarter of the Galaxie and Fairlane model years, nor indeed at all for the Mercury or Custom Comet models. Thus as a result of Ford's tied marketing practices they have been wholly debarred from the Mercury and Custom Comet markets, debarred from an important part of the sales season for the Galaxie and

Fairlane markets, and subjected to enhanced costs which have caused their dwindling sales of Galaxie and Fairlane custom car radios to be made at a serious out-of-pocket loss (Appellants' R.A. 64, 65, 66, 135). Moreover, they incur severe injury to their good will and reputation as suppliers of a complete line of custom automobile radios for new cars (Appellants' RA 128, 131, 138).

The district court agreed with petitioners that a car radio, even when installed at the automobile factory, remains a separate "product" and does not become a part of the automobile (Appellants' RA 156). The court of appeals did not disturb that finding of the district court and affirmed the denial of a preliminary injunction "on the narrow ground that Automatic has made no compelling case of immediate irreparable injury. Moreover, the allegations and affidavits are not such as to convince us of such a strong probability of success on the merits that we should apply a less stringent requirement of proof of irreparable injury."

In finding no immediate irreparable injury, the court of appeals subordinated the concept that the public has an interest in car radio competition. The court pointed to evidence "that, whatever the source of radios installed in Ford cars, the price of the radio to the consumer is the same." Acknowledging the possibility that a greater profit margin on radios would give Ford dealers more to "play with" in dickering with customers over price or trade-in, the court of appeals nonetheless gave scant weight to the public interest in preserving this competition. In so doing it ignored unchallenged evidence that petitioners' competition was responsible for reducing consumer prices in car radios (Appellants' RA 34-43, 138-139).

The court of appeals also characterized petitioners' public-injury argument as "unrealistic in failing to take into account the fact that Automatic, if successful on the merits, would be entitled to permanent injunctive relief which would permit competition to revive." Injunctive relief against monopolization, to be effective, must be timely. Like artificial respiration, the longer it is postponed, the less likely it is to be successful. And experience teaches that sweeping injunctive relief against an entrenched monopoly position is glacially slow and of limited effectiveness. See, for example, *United States* v. *United Shoe Machinery Corp.*, No. 597 on the appellate docket of this Court.

In rejecting the claim of irreparable injury to petitioners' business, the court of appeals also said that Automatic is not "a consumer-oriented enterprise" but one that competes for the custom of dealers "who, in turn, seek Automatic's product because it is a lower cost product, yielding them a greater profit." Therefore, the court reasoned, "the basic pricing situations strongly suggest that, should Automatic ultimately prevail on the merits, the status quo ante would be quickly restored to the extent that price advantage remained a critical consideration." By reason of Ford's intensified price competition petitioners already have been constrained to price their product at a level which now reflects a net loss to them. With Ford's superior ability to cut prices, and its demonstrated willingness to do so (Appellants' RA 34-43), it seems unlikely that price advantage can "remain a critical consideration" of sufficient economic force to re-establish petitioners in a market from which they have been excluded. Indeed, because petitioners are not a "consumer-oriented enterprise," but sell into a market dominated and controlled

by Ford, money damages cannot serve as adequate restitution for the good will lost to the petitioners by their Ford-imposed inability to serve Ford dealers as reliable, full-line suppliers of custom radios. With money damages, they can buy back neither their market position nor their good will, even if the dollar values of these items could be accurately computed and were amply reflected in damages. Ford would continue to possess the monopoly advantage it is gleaning by the post-complaint commercial aggression it is directing against the petitioners at a time when they are entitled to the protection of the law.

REASONS FOR GRANTING THE WRIT

1. A grant of certiorari herein will permit the Court to resolve a conflict among the circuits as to the irreparable-injury criteria to be applied in passing on motions for preliminary injunctions in private antitrust cases. The criteria applied by the First Circuit in the present case stand out in sharp contrast to those spelled out by the Court of Appeals for the Third Circuit in *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F. 2d 725 (3d Cir. 1962) and in *Bateman* v. *Ford Motor Co.*, 302 F. 2d 63 (3d Cir. 1962), and by the Court of Appeals for the Second Circuit in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738 (2d Cir. 1953). All three cases were cited and relied upon by petitioners in the court of appeals.

A. The Third Circuit in *Bergen Drug* held that irreparable injury was shown when the plaintiff was barred from a limited market by defendant's post-complaint acts and would suffer loss of good will. As in this case, the plaintiff did not sell to a consumer market. It was

a wholesale druggist, selling to retail pharmacies. The Third Circuit was dealing with the adequacy of money damages to compensate for injury to good will. It held that money damages were inadequate, citing its earlier decision in *Bateman* v. *Ford Motor Co.*

The First Circuit's ruling of law is the reverse. It holds that when a plaintiff is barred from a market by defendant's post-complaint acts and suffers loss of good will he can be adequately compensated in money damages. The First Circuit was obviously mistaken when it tried to distinguish *Bergen Drug,* citing that case as involving a situation "where inability to supply 'a full line' of products causes the purchaser to shift his business permanently to other suppliers." Indeed, petitioners present a more compelling case for preliminary injunctive relief than did *Bergen Drug,* for the market in which petitioners must recover their competitive position is the franchised-dealer system over which Ford, the much larger competitor charged with monopolization, exercises overwhelming economic control. Obviously, therefore, in attempting to reconcile its conclusion with the holding in the *Bergen Drug* case, the First Circuit has in effect held that it is easier for an excluded competitor to recover its position as a single line supplier to a captive market like Ford's franchised dealer system than it is to recover competitive standing as a multi-line seller in a market which is not wholly dominated by any single supplier, let alone the second largest industrial enterprise in the United States.

B. There is also a conflict between the First and Third Circuits regarding the public interest in private antitrust actions. The Third Circuit in *Bergen Drug*

explained their importance as "a vehicle for serving not only the immediate interests of the litigants but the continuing interest of the public in a smoothly functioning and unobstructed system of commerce . . ." and held that the public interest factor "weighs heavily . . . in considering whether equity jurisdiction should be exercised." Here, in sharp contrast, the First Circuit sanctions at least temporary monopolization and risks permanent monopolization on the basis of its unverified, unsupported, speculative theory that petitioners may re-enter the market and that competition may be restored to the market at some unspecified date in the distant future, some time after a permanent injunction whose metes and bounds are unspecified, is ultimately entered.

In support of its action the First Circuit cited *Imperial Chem. Indus. Ltd.* v. *National Distillers & Chem. Corp.*, 354 F. 2d 459 (2d Cir. 1965). But that case did not involve any germane antitrust considerations whatever. It concerned only the special right of a business enterprise in its trade secrets. When the public interest in a competitive economy is involved, the Second Circuit, too, favors use of the preliminary injunction "as an equitable policing measure . . . to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953).

C. Another principle spelled out by the Second Circuit in the *Hamilton-Benrus* case was: "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely

certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." In the present case, the First Circuit agreed that petitioners' claims are not "insubstantial and frivolous" but raise "substantial and novel" questions. Nevertheless, without pointing to any hardships a temporary injunction would create for Ford— and therefore prevent the "balance of hardships" from tipping toward plaintiffs—the First Circuit refused to order a halt to progressing monopolization until a "more deliberate investigation" can be made into the legality of the marketing practices being used to accomplish that monopolization. The right of plaintiffs in the present case to a final judgment is certainly no less certain than it was in the *Bergen Drug* and *Hamilton-Benrus* cases. The *Hamilton-Benrus* case was one of the first merger proceedings to arise under the 1950 amendments to section 7 of the Clayton Act and presented questions of first impression under those amendments. And in the *Bergen Drug* case the Third Circuit was faced with the then novel question whether the *Colgate* doctrine, 250 U.S. 300 (1919), which normally permits a businessman acting independently to exercise broad freedom in the choice of his customers, allows him to refuse to deal with those who bring antitrust treble-damage suits against him.

In the opinion of the First Circuit in the present case, no question is raised as to the legal sufficiency of the charges made in petitioners' complaint or as to the adequacy of the evidence of antitrust violation in the

affidavits and other documentary evidence submitted by petitioners in the district court.* Rather, the court of appeals refers only to "the substantial and novel question involving disputed evidence of motivation and causation of Ford's increase and Automatic's decline in sales." But proof of actual monopolization and anti-competitive tying arrangements need not include evidence of specific intent; a general intent to do the act resulting in monopolization or tying is enough. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945); *Times-Picayune Publ. Co.* v. *United States,* 345 U.S. 594 (1953); *Northern Pac. Ry. Co.* v. *United States,* 356 U.S. 1 (1958). And the uncontested facts of Ford's increase in radio sales with the adoption of new dashboard marketing practices and of petitioners' decline in sales are themselves the clear evidence of causation. "The jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits, and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251 (1946). In *Richfield Oil Corp.* v. *Karseal Corp.,* 271 F. 2d 709 (9th Cir.

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* Ford, with a monopoly of automobile sales to its franchised dealers, has used the leverage of that monopoly to achieve a monopoly position in sales of custom car radios to those dealers, and is seeking by its tied selling practice to achieve an even greater share of the market. Using such monopoly power to beget monopoly has long been outlawed. United States v. Griffith, 334 U.S. 100 (1948). Tied selling in such circumstances is illegal. United States v. General Motors Acceptance Corp., 121 F. 2d 376 (7th Cir. 1941), cert. denied 314 U.S. 618 (1941); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

1959), the court agreed with a damage claimant's assertion that, "having shown the illegal restraint applied to its products" by a competing seller, "it had proved the causal connection between the defendant's wrongful act and the loss of revenue."

2. This Court has never defined the criteria to be applied by district judges in granting preliminary injunctions in private antitrust actions, and now should do so for the guidance of inferior federal courts. The present case dramatically illustrates the importance of maintaining the status quo pendente lite if private antitrust litigation is to be an important instrument of public policy rather than merely a salve for the wounds inflicted on the victims of anticompetitive conduct. According to the First Circuit, the element of speculation necessarily involved in a jury's determination of the amount of profits petitioners would have made but for Ford's wrongdoing is not a relevant factor in determining whether the continuing injury being inflicted upon petitioners during the litigation is irreparable, since "we have long since crossed the bridge of precision of proof of causation and extent of damages in antitrust cases." For the guidance of the federal courts, this Court should resolve this question whether damages that are speculative in amount can be considered an adequate remedy making it unnecessary to put a stop to continuing antitrust violations while some determination of damages is made by a jury. Speculation can work two ways; it does not necessarily advantage a plaintiff, for a jury can, when permitted to speculate, arrive at an inadequate verdict.

In addition, it is particularly important that the district courts be advised that the fact damages will be

trebled is not an element to be considered in determining whether the right to damages will provide adequate relief in an antitrust proceeding. Otherwise they may follow the First Circuit's ruling in this case with the result that the damage trebling policy adopted by Congress will be significantly weakened as an enforcement tool, and the Congressional dispensation of preliminary injunctive relief for private antitrust plaintiffs, as provided by section 16 of the Clayton Act, will be frustrated.

3. The court of appeals has fallen into error that should be corrected to avoid serious and unwarranted curtailment of the efficacy of private antitrust litigation to enforce the antitrust laws. When, as is the situation here, antitrust violations are rapidly creating a complete monopoly in a particular market, "Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred." *Klors, Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207, 211 (1959); *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.,* 364 U.S. 656, 660 (1961). Public injury is inherent in every day of progressing monopolization. This public injury is irreparable, for there is no way the final judgment obtained by the private plaintiff can restore, by some retroactive effect, the competition, the effective allocation of economic resources, and the price-suppressing rivalry to which the public is entitled during the long years it will take to litigate this private suit to final judgment. And the public will collect no damages for the injury it is sustaining. "In no civilized country should the jurisprudence insist that a wrong be allowed to happen and compensation sought thereafter rather than preventing the occurrence of the

wrong." DeFuniak, *Requisites for Equitable Protection Against Torts,* 37 Ky. L.J. 29, 35 (1948).

If the judgment below is not reversed, Ford's monopolization of car radio sales to its franchised dealers will destroy the relevant market itself. Without immediate preliminary relief, the monopolization practices under attack will bring an end to the purchase of radios by new-car dealers for installation by their service personnel. Statistics related to Ford dealers' radio purchases reveal that, even as this suit is being litigated, a rapid shift is being made to factory-installed radios; indeed, there is uncontroverted evidence, taken from Ford's own records (Appellants' RA 35), that Ford has been striving to discourage dealer installation of radios. Therefore, despite the district court's finding that a car radio is a separate product and not a part or accessory of the automobile itself, marketing practices are taking hold that are rapidly terminating all merchandising of car radios as products separate from the automobiles in which they are installed. In some models of cars, radios have become standard equipment. For all Ford models in which radios are not standard equipment, Ford dealers are apparently attempting to anticipate their customers' desires by ordering enough cars with factory-installed radios to fill the demands of all customers who want radios. It now appears likely that, by the time petitioners' right to a permanent injunction has been litigated, Ford's franchised dealers will have firmly established buying patterns oriented toward factory-installed radios, which a mere injunction against anticompetitive conduct cannot erase. And the court of appeals' explicit finding (App. B, p. 19a) that petitioners' custom car radio business is not a "consumer-oriented enterprise" shows

that petitioners cannot depend on appeals to the ultimate consumer to select dealer-installed radios.

The decision below, by permitting Ford during this litigation to complete the conversion of its franchised dealers to factory-installed car radios, will give each of the other automobile manufacturers an irresistible incentive to undertake a similar program. Coupled with the absence of any consumer orientation with the market for dealer-installed car radios and the overwhelming economic domination automobile manufacturers exercise over their franchisees, denial of immediate injunctive relief in this case means that competition in the marketing of car radios will disappear entirely. Moreover, a precedent will be set for conversion to full factory installation of other similar products manufactured for use in or on automobiles. Such is the monopolistic control automobile manufacturers exercise over their franchised-dealer marketing systems that they can readily establish themselves as the only substantial manufacturers not only of car radios but also of car air conditioners, cartridge tape players, luggage carriers, and other automobile appurtenances, in the sale of which there is now substantial independent competition.

CONCLUSION

Although this action has been pending since April 1963, no trial date has even yet been set despite petitioners' best efforts. In the meantime, Ford's custom car radio monopolization proceeds apace on the basis of anticompetitive practices adopted after petitioners' complaint was filed, and at the expense of petitioners' legitimate business interests. All the while, petitioners are being denied the protection of the courts that the

rules of the Second and Third Circuits would give them, and even the inadequate relief of money damages is not yet in sight. If this petition for a writ of certiorari be granted, petitioners can receive a substantial measure of relief long before this litigation is concluded. Accordingly, for the reasons hereinbefore set forth conformably with Rule 19 of the Revised Rules adopted June 12, 1967, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Sherman Act

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which, bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any State, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes", approved September 26, 1914: Provided further, That the proceeding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX A

Sherman Act

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes", approved September 26, 1914: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Clayton Act

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 63-387-G

AUTOMATIC RADIO MFG. CO., INC. and AUTOMATIC RADIO SALES, INC., *Plaintiffs,*

v.

FORD MOTOR COMPANY, *Defendant.*

Memorandum and Order on Automatic Radio's Motion for Preliminary Injunction

(272 F. Supp. 744)

SEPTEMBER 20, 1967

GARRITY, J. This matter came on for hearing before the court upon plaintiff's motion for a preliminary injunction pursuant to 15 U.S.C. 26. The plaintiff seeks an order enjoining defendant Ford Motor Company from refusing to supply to its dealers automobiles without factory-installed radios which are identical to automobiles delivered with them, i.e., having identical dashboards but with an empty compartment or hole where the radio is ordinarily installed. There is presently pending before the court an antitrust action between the parties, instituted on April 26, 1963. A motion by the defendant for summary judgment was denied by Judge Caffrey on May 28, 1964. *Automatic Radio Manufacturing Co.* v. *Ford Motor Company,* D. Mass., 1964, 35 F.R.D. 198. A prior motion by the plaintiffs for a preliminary injunction was denied by Judge Caffrey on June 28, 1965. *Automatic Radio Manufacturing Co.* v. *Ford Motor Company,* D. Mass., 1965, 242 F. Supp. 852. On February 17, 1967, plaintiffs filed this motion for a preliminary injunction. Considerable discovery was made by the parties in preparation for the hearing. Voluminous affidavits and briefs were submitted.

Although the history and facts of this case are described in detail in Judge Caffrey's opinions, they bear some repetition and additional description now. Plaintiff Automatic Radio Manufacturing Co., Inc., manufactures custom automobile radios sold by its affiliate, plaintiff Automatic Radio Sales, Inc., through its distributors to automobile dealers throughout the nation, including dealers who sell automobiles manufactured by defendant. A custom automobile radio is one that is designed and adapted for installation in a particular model of automobile. Defendant manufactures custom automobile radios for installation in its automobiles either at the factory or by its dealers. The radios manufactured and sold by plaintiffs for installation in defendant's automobiles are practically indistinguishable in appearance, after installation in automobiles, from radios manufactured by defendant.

For many years, when an automobile manufactured by defendant or by another manufacturer was delivered to a dealer without a radio installed at the factory, the opening in the instrument panel designed to accommodate a radio was covered by a small piece of metal called a "knockout plate." If a dealer wished to install a radio manufactured either by the automobile manufacturer or by plaintiff, he could easily remove the "knockout plate" and install the radio in the bared opening. However, in some of its 1965 models first appearing in the fall of 1964, the defendant placed a plastic cover about 27" wide over the entire instrument panel with holes in it for various dashboard gauges and instruments and, if a radio had been factory-installed, for the dial, pushbuttons and knobs for the radio. For cars without factory-installed radios, the plastic dashboard cover was identical except that it had no holes for a radio. If a dealer wished to install a radio, the entire dashboard cover would have to be removed and replaced by one with holes in it for radio knobs and pushbuttons in addition to the holes for the other instruments, i.e., a dashboard cover identical to the type used at the factory for a car

equipped with a factory-installed radio.[1] Dashboard covers with holes for radios in them have been called "perforated" and those without holes for radios "imperforate."

The custom radios which both parties supply to dealers for installation in defendant's automobiles are sold in "kits" containing all necessary parts. When instrument panels of defendant's automobiles were manufactured with "knockout plates" and for those models of defendant's automobiles that still are, the kits contain essentially a radio, an antenna and various small attachment parts. However, for automobiles delivered to dealers with imperforate dashboard covers, the radio installation kit must also contain a perforated cover. The defendant has added one to its radio installation kit without having raised the price of the kit to the dealer.

Plaintiffs owe a great part of their success to the fact that they sell their radios to automobile dealers for a considerably lower price, about $10 less, than radios sold by automobile maufacturers. If plaintiffs are to continue to compete with defendant, they now must also supply perforated dashboard covers with their radio installation kits. Since defendant did not increase the price of its kit when it added a perforated dashboard, plaintiffs must absorb most, if not all, of their added cost of a perforated dashboard cover if they are to retain their competitively lower price. Plaintiffs allege that because of this added cost they are now losing money on radio installation kits sold to dealers of defendant's cars. But the problems allegedly facing plaintiffs are not confined to cost. Plaintiffs allege that because of the difficulties in retooling, securing the necessary materials and manufacturing these dashboard covers, they are unable to supply them to dealers

[1] Theoretically it is possible for a dealer to punch or saw holes for a radio in an imperforate plastic dashboard cover. But this the court finds not to be practicable. The appearance of the whole is apt to be marred or the plastic broken.

until a number of months after the beginning of the automobile model year. Plaintiffs thereby lose a great amount of business and also allegedly incur great damage to their goodwill and reputation as suppliers of a "complete line" of custom automobile radios for new cars. Finally, plaintiffs allege that they are completely excluded from supplying radio installation kits for some of defendant's models, such as the 1967 Mercury and Deluxe Comet, because they are unable to secure the materials necessary to manufacture the appropriate dashboard.

Plaintiffs allege that defendant's practice of selling to its dealers an automobile equipped with a perforated dashboard only when the dealer orders a radio installed in that automobile at the factory constitutes "tied selling" in violation of both Section 1 of the Sherman Act and Section 3 of the Clayton Act and monopolization of trade in violation of Section 2 of the Sherman Act. Plaintiffs have now moved for a preliminary injunction enjoinng defendant from refusing to deliver to its dealers automobiles with perforated dashboards but without radios installed at the factory. The form of injunction proposed by the plaintiffs would require the defendant to change its regular vehicle ordering system by modifying its forms so that provision is made for the regular ordering of automobiles with perforated dashboards but without radios. As matters now stand there is no space, or line or box to be checked on the order forms regularly used by the defendant's dealers for ordering delivery of a car so equipped. To this the defendant responds that its dealers have never ordered or inquired about delivery of an automobile with a perforated dashboard but without a radio; that such an order, if received, would be treated as a special order which might or might not be filled. Moreover, the defendant says, delivery of cars to dealers in such an unfinished condition would detract from their saleability. If driven at night in such a condition, they would be unsafe because light would shine from behind the dashboard obscuring parts of the

instrument panel. Dealers sometimes order substantial quantities of cars for inventory, especially soon after the new models come out, without knowing whether or not customers will wish radios to be installed, thus enhancing the possibility that unfinished cars might get into the hands of customers.

The defendant has raised numerous legal objections, including that (a) its practice does not constitute a tying arrangement, (b) it is unlikely that plaintiffs will prevail on the merits, (c) plaintiffs have failed to prove the danger of immediate and irreparable damage, and (d) plaintiffs have "unclean hands."[2]

Plaintiffs insist that their present motion is "in sharp contrast" to the one denied by Judge Caffrey in 1965 and therefore the court is not now bound by his decision as the "law of the case." The court agrees with plaintiffs' legal conclusion but not with the stated premise. The doctrine of the "law of the case" is inapplicable because the prior denial of an injunction was interlocutory and discretionary, *United States* v. *United States Smelting Co.*, 1950, 339 U.S. 186, 198-9, *Dictograph Products Co.* v. *Sonotone Corp.*, 2

[2] The court does not reach the issue of "unclean hands," but notes in passing that the vitality of the defense may be greater in proceedings under 15 U.S.C. § 26 than under 15 U.S.C. § 15. *Graham* v. *Triangle Publications, Inc.*, E.D. Pa., 1964, 233 F.Supp. 825, 831-2. The court also notes that while the parties are competing for the many millions of dollars spent each year for custom radios for defendant's automobiles, this competition appears to be almost completely hidden from the consuming public. Plaintiffs appear to make every effort to supply dealers with radios as indistinguishable in appearance as possible from those manufactured by defendant, with the result that a radio made by the plaintiffs may be installed at the same retail price without the consumer knowing or having any reason to inquire by whom it was manufactured. Regardless of whether plaintiffs are deliberately striving to deceive the public, they provide a great temptation to defendant's dealers to increase their profits by passing off plaintiffs' radios as those manufactured by defendant, particularly if the consuming public has not been alerted by either party to the potential confusion.

Cir., 1956, 230 F. 2d 131, 134-6, and the situation has changed in several respects, *Securities and Exchange Commission* v. *Graye*, S.D. N.Y., 1957, 156 F. Supp. 544, 546, *Reiter* v. *Universal Marion Corp.*, D.C., 1959, 173 F. Supp. 13, 15-16. The facts differ from those in 1965 in that the defendant's use of dashboard covers has been extended to other models, plaintiffs' losses have mounted and one of the three competitors of the defendant in 1965, Soundex Radio Corporation, went into bankruptcy in 1966 and its former sales director blames it principally on the defendant's conduct of which the plaintiffs here complain. Also since 1965, the record of the case has been greatly enlarged by pretrial discovery. The law, too, has developed, e.g., the fact that a franchising program had been unilaterally conceived by the manufacturer did not shield it from § 1 of the Sherman Act, or even help it much in defending against an alleged violation. *United States* v. *Arnold, Schwinn & Co.*, 1967, 35 L.W. 4563, 4564. The relief sought by the plaintiffs is also different. In 1965 they sought to bar the defendant from delivering any cars to dealers with imperforate dashboards. They do not seek such an order now. For present purposes they concede the right of the defendant to send dealers automobiles with imperforate dashboards except when a dealer has ordered a car with a perforated dashboard but without a radio. In that event, say the plaintiffs, the defendant should be compelled to ship what the dealer has ordered. Also unlike their motion in 1965, the plaintiffs now seek an order compelling the defendant to print up and put in use new order forms, as explained.

But the basic problem remains the same, namely, whether the defendant's discontinuance of simple knockout plates in favor of fancy, plastic dashboard covers is equivalent to a tying arrangement proscribed by the statutes. The answer will involve an exercise in semantics. Some of the governing principles are clear:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product

but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. (fn. 4) Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price."

Northern Pac. R. Co. v. *United States,* 1958, 356 U.S. 1, 5-6. And it is undisputed that the defendant sells automobiles without radios and radios without automobiles. One difficulty lies in determining the defendant's "product." The plaintiffs' view is that when the defendant delivers a car with a factory-installed radio, it is delivering two "products," one a custom radio and the other an automobile with holes in the dashboard cover which have been plugged up or filled by radio parts. The plaintiffs argue that the defendant should be compelled to supply that holey product separately should a dealer place an order for one. The defendant's position is that an automobile with empty holes in the dashboard is not a product, but an unfinished, partially assembled machine which it has never offered to sell in that condition. The defendant asserts that dashboard styling and finish are not frills, but important and essential components of an automobile in today's style-minded market. The parties have cited no precedent on this point and the court knows of none. The court does, however, reject the suggestion of the defendant that the plaintiffs' situation is indistinguishable from that of sellers of bumpers, hang-on fender lights, outside auto trunks and luggage racks which were in vogue decades ago. Their goods became parts of automobiles and lost their identities as accessories. Radios have retained their identity as separate products.

On the issue whether the plaintiffs have shown "that the danger of irreparable loss or damage is immediate," 15 U.S.C. § 26, the plaintiffs have presented an anomalous

case. They have shown greater losses on sales to defendant's dealers than had been incurred at the time of the 1965 hearing, but presented virtually no proof to connect these losses with conduct of the defendant. Plaintiffs contended in 1965 that dealers bought fewer radios from plaintiffs because the time required by a mechanic to remove a dashboard cover and install a plaintiff's radio was considerably greater than formerly when knockout plates were used. Judge Caffrey found to the contrary and the plaintiffs have not now challenged that finding. In response to defendant's interrogatories filed in March 1967, plaintiffs listed 25 dealers who had allegedly declined to buy radios from plaintiffs because of the dashboard change complained of. Only one of them, a dealer named Chuhinko, mentioned increased installation time as a reason for reducing his purchases from the plaintiffs and he described it as being "a minor factor." The plaintiffs' cost of furnishing a perforated dashboard cover with its radio for a 1967 Ford is $4.50 compared with $1.46 for a 1966 Ford and $1.87 for a 1965 Ford. A major factor in the cost per unit is the cost of tooling and building assembly lines. That part of the cost per unit would be cut in half if sales should double. It would serve no purpose to duplicate the detailed findings contained in Judge Caffrey's opinion. Suffice it to say that in every particular they were corroborated by voluminous evidence of events since 1965. The court finds that plaintiffs have thus far failed to establish a causal relationship between the dashboard change and plaintiffs' declining sales.[3] The court finds that the chief reason for the decline is probably the current shortage of trained mechanics and service stalls and dealers' consequent preference for factory-installed equipment.

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[3] Plaintiffs' sales of custom radios to dealers selling General Motors and Chrysler Corporation automobiles, which continue to be equipped with "knockout plates," have decreased considerably in recent years too.

On the same issue of irreparable and immediate damage, the over-all business of the plaintiffs is prospering. While they have lost some distributors during the past two years, they have replaced them and added new ones so that the total number of their distributors has increased. The plaintiffs have not shown that, if they ultimately prevail,[4] it will not be possible or will be extraordinarily difficult to compensate them adequately in money damages for whatever losses of sales and goodwill they may have suffered by reason of defendant's conduct. *Foundry Services* v. *Beneflux Corp.*, 2 Cir., 1953, 206 F. 2d 214, 216; *Gerber Products Co.* v. *Beech-Nut Life Savers*, S.D. N.Y., 1958, 160 F. Supp. 916, 921, 923.

The nature of the specific relief sought by the plaintiffs also militates against granting their motion. As contrasted with their position in 1965, when they sought to block delivery by the defendant to its dealers of all Ford and Fairlane cars equipped with imperforate dashboard covers, they now seek to bar delivery of such a car only if delivered pursuant to an order for a car with a perforated dashboard but without a radio installed in it. In view of the defendant's evidence that it has never received orders for automobiles so equipped, nor even an inquiry about their availability, the court's order if granted might prove nugatory. Moreover, supervision of the defendant's compliance might present untold difficulties, considering the number of Ford dealers, approximately 7,200, and the many options involved in ordering a new car and accessories. Difficulty of enforcement may itself constitute a sufficient reason for denying injunctive relief. See Note, "Develop-

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[4] The present posture of these proceedings does not support very strongly either the preliminary aspect of the injunction or the immediacy of the alleged danger of irreparable loss or damage to plaintiff's business. The suit was instituted in 1963 and it is expected that discovery will have been completed and the trial will commence within a year.

ments in the Law—Injunctions," 78 Harv. L. Rev. 994 at 1012 (1965). Finally, a preliminary injunction requiring the defendant to print up and use new order forms would be mandatory in character. Such injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Clune* v. *Publishers' Association of New York City*, S.D. N.Y., 1963, 214 F. Supp. 520, 531.

The court concludes that the plaintiffs have not made a sufficient showing to support issuance of the preliminary injunction sought. In particular, the plaintffs have not established by evidence offered on the pending motion (a) that the defendant's marketing practice of supplying imperforate dashboards unless radios have been factory-installed is equivalent to an illegal tying arrangement, this being an unresolved question which must be more fully developed both factually and legally at the trial; (b) that the defendant's practice has caused irreparable damage to the plaintiffs or threatens immediately to do so; and (c) that the form of relief sought would be efficacious and appropriate under the circumstances. The plaintiffs' renewed motion for a preliminary injunction is denied.

ANDREW A. CAFFREY
United States District Judge

APPENDIX B (Continued)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7021

AUTOMATIC RADIO MFG. CO., INC., ET AL.,
Plaintiffs, Appellants,

v.

FORD MOTOR COMPANY, *Defendant, Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Worth Rowley, with whom *Roger P. Stokey, Walker B. Comegys, Jr., Goodwin, Procter & Hoar* and *Englander, Englander & Englander* were on brief, for appellants.

Claude R. Branch, with whom *Conrad W. Oberdorfer, Thayer Fremont-Smith, Richard B. Darragh* and *Harvey S. Kronfeld* were on brief, for appellee.

March 5, 1968

COFFIN, *Circuit Judge.* This is an appeal from a denial of a preliminary injunction sought by a manufacturer of automobile radios, Automatic Radio Mfg. Co., Inc. (Automatic),[1] against Ford Motor Company (Ford), to restore its competitive position in the automobile radio market pending the outcome of a private antitrust suit seeking treble damages and injunctive relief under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for alleged viola-

[1] A wholly owned sales subsidiary, Automatic Radio Sales, Inc., is also a plaintiff-appellant.

tions of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and section 3 of the Clayton Act, 15 U.S.C. § 14.

Automatic is a substantial manufacturer of custom car radios adapted to fit into the dashboards of particular models and makes of automobiles. Its radios are designed for use in most of the models of the major United States automobile manufacturers. Its immediate customers are distributors who resell the radios to new car dealers. In the instant case, its ultimate customers are Ford car dealers. For years its radios and installation kits have been sold to many of these dealers, particularly in the eastern part of the United States, for approximately $10 less than the cost of a Ford radio installed at the factory.

Until 1964, each Ford model had the same basic instrument panel whether the car was equipped with a radio or not. If an automobile was ordered without a factory installed radio, the opening for the radio was covered by a "knockout plate". The dealer could easly remove the plate and, using the accessories contained in kits, install either a Ford radio or one manufactured by appellant or other producers. In the fall of 1964 Ford changed its dashboard styling in two of its models. In cars equipped with factory installed radios a 27 inch wide plastic dashboard cover, with openings for various dashboard gauges and radio knobs, buttons and dial, was used. In cars ordered without radios, the same plastic dashboard cover was used except that it was partly imperforate; it had no openings masked with a "knockout plate" where a radio would otherwise be located. If a dealer wished to install a Ford radio, the perforated cover, with holes for a radio, would be furnished with the installation kit without extra charge. If a dealer wished to buy a perforated cover separate from a kit, the price ranged from $5 to $7.67.[2] With the introduction of

[2] Although the record contains somewhat varying costs estimates, the following table gives an approximate comparison of costs and

the 1967 Mercury and Deluxe Comet, Ford extended its styling changes and used a different kind of imperforate cover, apparently more difficult to duplicate.

While the inclusion of a perforated cover free of extra charge in the Ford installation kit reduced or in some cases eliminated the price advantage previously enjoyed by Automatic, appellant complains that it is further prejudiced by the time and expense necessary to tool up for and produce its own replicas of Ford's perforated covers. This delay allegedly causes it to miss out on the lucrative first sales months of the automobile year or, in the case of the Mercury and the Comet, to lose sales for the entire year. Automatic complains not only that its sales of radios for Ford cars have been cut in half, and its profits on these sales converted into losses, but also that it has lost its good will as a reliable full line custom radio supplier. It further alleges damage to the consuming public in the erosion of the competition it has hitherto contributed.

The injunction sought by Automatic would require Ford, upon request of its dealers, to deliver automobiles without radios but with perforated dashboard covers and to issue order forms to provide for the ordering of automobiles so equipped. The district court found (1) that Automatic did not establish a causal relationship between Ford's dash-

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profits to the dealer when he buys a Ford factory installed radio, installs a Ford radio, and installs an Automatic radio.

	AUTOMATIC KIT	FORD KIT —Lots—			FORD FACTORY INSTALLED
		1-9	10-99	100 or more	
Radio kits	$28.50	$42.95	$39.95	$34.95	$45.45
Installation—antenna					1.75
Perforated plate	5. to 7.67				
Installation—labor	3. (approx.)	3.00	3.00	3.00	
Costs to dealer	$36.50 to $39.17	$45.95	$42.95	$37.95	$47.20
Cost to customer	$58.50	$58.50	$58.50	$58.50	$58.50
Cost to dealer	36.50 to 39.17	45.95	42.95	37.95	47.20
Profit to dealer	$22.00 to $19.33	$12.55	$15.55	$20.55	$11.30

board changes and its own declining sales; (2) that it did not demonstrate that adequate monetary compensation would be impossible or extraordinarily difficult; (3) that the relief requested might prove "nugatory" or ineffective in achieving any relief; and (4) that supervision of Ford's 7,200 dealers might render enforcement of a decree too difficult. It concluded that the circumstances did not justify the mandatory form of decree requested and that the existence of an illegal tying arrangement had not been established. It said nothing as to alleged Sherman Act violations.

Automatic, in prosecuting this appeal, bears a heavy burden. It must show either a clear error of law or an abuse of discretion by the district court in denying the injunction. *Bowling Mach., Inc.* v. *First Nat'l Bank of Boston*, 283 F.2d 39, 43 (1st Cir. 1960). More specifically, appellant must show error or abuse of discretion in refusals to find (1) that Automatic had demonstrated a danger of immediate irreparable harm absent such injunctive relief, 15 U.S.C. § 26; (2) that Automatic had shown a probability that it would prevail on the merits, *Imperial Chem. Indus. Ltd.* v. *National Distillers & Chem. Corp.*, 354 F.2d 459, 461 (2d Cir. 1965), *but see Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); and (3) that a decree requiring some affirmative action by appellee was justified, *Joseph Bancroft & Sons Co.* v. *Shelley Knitting Mills, Inc.*, 268 F.2d 569, 574 (3d Cir. 1959).

This case has long been aborning.[3] It is time that the

[3] The complaint was filed on April 26, 1963. Thirteen months later, Ford's motion for summary judgment was denied. *Automatic Radio Mfg. Co* v. *Ford Motor Co.*, 35 F.R.D. 198 (D. Mass. 1964). In September 1964, Automatic sought a preliminary injunction, which was denied in June 1965. *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 242 F. Supp. 852 (D. Mass. 1965). A year and one half later, in February 1967, Automatic sought the preliminary injunction here at issue, which was denied in September 1967. We are, therefore, still dealing with preliminaries after nearly five years of motions, affidavits, briefs, and hearings.

merits be tested. We dispose of this appeal on the narrow ground that Automatic has made no compelling case of immediate irreparable injury. Moreover, the allegations and affidavits are not such as to convince us of such a strong probability of success on the merits that we should apply a less stringent requirement of proof of irreparable injury. *See generally Developments in the Law—Injunctions,* 78 Harv. L. Rev. 994, 1056 (1965). By so saying, we do not mean to imply that Automatic's claims are insubstantial and frivolous.

We take Automatic's claims of injury warranting injunctive relief in reverse order. As for the public, two arguments are made. The first is that Automatic's continued access to Ford dealers without the barrier of the recent marketing practices is a prerequisite to "meaningful price competition". The second, and related, argument is that treble damages are a cheap price to pay for the elimination, pendente lite, of this competition and obtaining a monopoly in the supply of car radios. As to the first contention, the affidavits of the Ford dealers almost uniformly avow that, whatever the source of radios installed in Ford cars, the price of the radio to the consumer is the same.[4] Even if, however, we take note of the likelihood that dealers who realize a greater margin of profit by using an Automatic radio have more to "play with" in offering a better price, particularly on trade-ins, the second argument is unrealistic in failing to take into account the fact that Automatic, if successful on the merits, would be entitled to permanent injunctive relief which would permit competition to revive.

Automatic next asserts that its good will as a reliable full line supplier of custom radios to Ford dealers is in jeopardy. It phrases the question as "whether money

[4] We do not say that benefits to dealers are not in the public interest. Our observation is directed only at the weight to be assigned, in this context, to appellant's "public interest" contention.

damages can adequately compensate appellants for lost competitive position and terminated business relationships." Were Automatic a consumer-oriented enterprise in the sense that its sales depended upon consumer consciousness of its product's availability or non-availability, we might be sympathetic to this claim. But Automatic's immediate customers are distributors who sell to dealers, who, in turn, seek Automatic's product because it is a lower cost product, yielding them a greater profit. This is not the situation faced in cases like *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962) or *McKesson & Robbins, Inc.* v. *Charles Pfizer & Co.*, 235 F. Supp. 743 (E.D. Pa. 1964), where inability to supply "a full line" of products causes the purchaser to shift his business permanently to other suppliers. Here, all non-Ford suppliers are treated alike. And, here, the basic pricing situations strongly suggest that, should Automatic ultimately prevail on the merits, the status quo ante would be quickly restored to the extent that price advantage remained a critical consideration. In short, we see "good will" in this situation the result of a very mercurial market—a market geared to the competing advantages of price and demand for service space and personnel rather than the attractiveness to the ultimate consumer of a trade name which he seldom sees.

Finally we come to Automatic's claim that

> ". . . the district judge, in leaving [Automatic and Automatic Radio Sales, Inc.] to their remedy in damages, put them in a position of having their rights governed by the speculation of a jury. The amount of the damage being inflicted on appellants by Ford's marketing practices is not precisely calculable, for it is measured by the profits appellants would have made but for Ford's wrongdoing, and those profits in turn must be determined by a jury on the basis of expert testimony that is almost certain to be conflicting."

We have long since crossed the bridge of precision of proof of causation and extent of damages in antitrust cases.

In *Momand* v. *Universal Film Exchanges, Inc.*, 172 F.2d 37, 42 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949), we recognize that "... in an antitrust suit, covering as it must many imponderables, rigid standards of precise proof would make a plaintiff's task practically hopeless." We emphatically ratified this approach in *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798, 804-06, n. 16 (1st Cir.), *cert denied*, 379 U.S. 931 (1964). *See generally Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1572-74, 1583-84 (1967).

In the meantime, we note that there is no danger of Automatic's demise. Its overall sales, profits, and number of distributors have increased. While such a posture does not negate the possibility that Ford has deprived appellant of lost profits or has caused losses in its business with Ford dealers, it is relevant to the question whether ultimate monetary compensation is likely to be an adequate remedy.

In conclusion, while we do not mean to forejudge the substantial and novel question involving disputed evidence of motivation and causation of Ford's increase and Automatic's decline in sales, we do not feel so compelled by the case made on the affidavits and exhibits as to require, pending trial, cessation of the styling and marketing practice which Ford has pursued for the past three and one half years.

Affirmed.

Judgment

March 5, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD, *Clerk*

By: /s/ DANA H. GALLUP
Chief Deputy Clerk

Enter:

ALDRICH, *Ch. J.*

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In The Supreme Court of the United States

OCTOBER TERM, 1967

No. 1279

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR COMPANY, *Respondent*

BRIEF FOR RESPONDENT

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HARVEY S. KRONFELD,
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April, 1968

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In The Supreme Court of the United States

OCTOBER TERM, 1967

No. 1279

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR COMPANY, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW

In addition to the unreported opinion of the Court of Appeals copied in the Petition, Appendix B, pp. 14a-20a, the Court may wish to consider the opinion of Judge Garrity in the District Court at 272 F. Supp. 744, denying the motion for preliminary injunction here involved. (A copy of that opinion is printed pp. 4a-13a of Appendix B to Petition, at the bottom of which is incorrectly inserted the name "Andrew A. Caffrey, *United States District Judge*"). The Court may also wish to consider the opinion of Judge Caffrey of the District Court on an earlier motion of petitioners for preliminary injunction reported at 242 F. Supp. 852 (a copy of which is printed in PPRA 43-54).*

*These letters refer to plaintiffs' printed record appendix in the court below. Other abbreviations used in this brief are the following: DPRA for defendant's printed record appendix; PXRA for plaintiffs' xeroxed record appendix; DXRA for defendant's xeroxed record appendix.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether this Court should grant certiorari to review the interlocutory order of the Court of Appeals which affirmed the denial by the District Court of a motion for a mandatory preliminary injunction on the ground, found by both courts, that plaintiffs* (petitioners here) had not shown, on the particular facts, that defendant's* practice had caused irreparable damage to them or threatened immediately to do so, and which denial properly could have been affirmed on other grounds.

COUNTERSTATEMENT OF THE CASE

In view of the fact that both courts below have concurred in the findings of fact on which the case turns and in light of the various grounds, hereafter stated, on which the preliminary injunction should be denied, it is unnecessary to correct all of the erroneous impressions of the facts in this record created by the Petition. There are, however, several statements in it which ought not to go unchallenged. They are discussed briefly in the appendix to this brief.

Before the 1965 model year, the openings for the radio in the instrument panels of defendant's cars, when delivered without a radio, were covered by a metal or plastic cover plate which plantiffs have referred to as a "knockout plate". (Affidavit of Oakes, para. 6, DXRA 56.)

When defendant's 1965 through 1967 Ford and Fairlane and 1967 Mercury and Comet DeLuxe cars were delivered without radios, the openings for the radios in their instrument panels were covered by a somewhat larger ornamental piece called a "finish panel" or a "lens" and "mask".

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*Throughout this brief we usually refer to petitioners here as "plaintiffs" as they were plaintiffs in the District Court and are referred to as such in opinions from which we quote. Similarly respondent here is usually referred to as "defendant".

(DPRA 106; affidavit of Woods, paras. 9, 21, 24, DPRA 209, 214, 215; affidavit of Oakes, para. 6, DXRA 56-57.)

Plaintiffs complain because when a radio is installed at a dealership in a 1965 through 1967 Ford or Fairlane or in a 1967 Mercury or Comet DeLuxe, it is necessary to remove the imperforate ornamental piece covering the opening for the radio and, to complete defendant's design of the instrument panel cluster, it is necessary to install a perforated ornamental piece. (DXRA 106-107.)

By their motion for a preliminary injunction plaintiffs seek to compel defendant to supply its dealers with cars without radios with perforated plastic or metal masks and lenses or finish panels, factory-installed, i.e. with uncovered holes in parts attached to the instrument panels.* Neither defendant, nor any other car manufacturer, has ever sold or offered for sale any car in such unfinished condition upon request of a dealer. Cars in such a condition are not finished products suitable for sale because they would have instrument panels with gaping and unsightly radio openings through which unsightly, unsafe and distracting instrument panel lights would shine at night and through which wiring, bracketry, and heater and air conditioning components could be seen. (DPRA 107,110; affidavit of Oakes, paras. 17-18, DXRA 62-63.)

Other car manufacturers have always covered the openings for a radio in the instrument panels of their cars before selling them to dealers or other customers. (Affidavit of Woods, paragraph 27, DPRA 216.)

Defendant has never refused to deliver such unfinished products to its dealers; it has never been asked to do this. Neither Ford Division nor Lincoln-Mercury Division of defendant has ever received even an inquiry as to the avail-

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*The Petition and the courts below sometimes refer to the instrument panel as "dashboard."

ability or price of any of its cars with a factory-installed perforated finish panel, mask or lens, without a radio, although requests by dealers for special equipment are not uncommon. (Affidavit of Bara, paras. 6-7, DPRA 112; opinion of Judge Garrity, Petition, Appendix B, p. 12a.)

The Petition refers to defendant's "overt tied selling" of custom radios and cars.

At the outset it should be pointed out that defendant does not tie the sale of its radios to sales of its cars. "It is undisputed that the defendant sells automobiles without radios and radios without automobiles". (Opinion of Judge Garrity, Petition, Appendix B, p. 10a.)

Over the years defendant has sold and continues to sell radio kits without cars to its dealers to enable them to install radios in the instrument panels of its cars, including the models involved in this motion. Defendant's dealers are and have been free to purchase cars from defendant, without a radio, and radio kits for these cars, without the cars, as they desire. (DPRA 110; affidavit of Redd, para. 3, DPRA 136; affidavits of Ford and Mercury dealers named in plaintiffs' answers to interrogatories, DPRA 62-105 and 148-205.)

The Petition also states (p. 4) that the preliminary injunction is sought "to preserve the status quo".

The granting of the injunction sought would not "maintain the status quo", as neither defendant nor any other automobile manufacturer has ever delivered cars in the unfinished condition in which plaintiffs seek to require defendant to deliver them. (Woods' affidavit, para. 27, DPRA 216.) The injunction sought would be mandatory in substance and effect, because it would require defendant to do something which it never has done, i.e. supply cars in an unfinished condition and change its marketing practice and ordering system so as to provide an option whereby dealers

could use and obtain unfinished automobiles with perforated pieces installed in them. (Opinion of Judge Garrity, Petition, Appendix B, p. 13a.)

The overriding significant fact is that both courts concluded that plaintiffs failed to show any irreparable loss or damage caused by defendant's practice of which they complain.

Judge Garrity's opinion denying the motion under consideration concluded (Petition, Appendix B, p. 13a):

> "... the plaintiffs have not established by evidence offered on the pending motion . . . that the defendant's practice has caused irreparable damage to the plaintiffs or threatens immediately to do so . . ."

The opinion also contains the following (Petition, Appendix B, pp. 10a-12a):

> "On the issue whether the plaintiffs have shown 'that the danger of irreparable loss or damage is immediate,' 15 U.S.C. § 26, the plaintiffs have presented an anomalous case. They have shown greater losses on sales to defendant's dealers than had been incurred at the time of the 1965 hearing, but presented virtually no proof to connect these losses with conduct of the defendant. . . .It would serve no purpose to duplicate the detailed findings contained in Judge Caffrey's opinion. Suffice it to say that in every particular they were corroborated by voluminous evidence of events since 1965. The court finds that plaintiffs have thus far failed to establish a causal relationship between the dashboard change and plaintiffs' declining sales. The court finds that the chief reason for the decline is probably the current shortage of trained mechanics and service stalls and dealers' consequent preference for factory-installed equipment.
>
> "On the same issue of irreparable and immediate damage, the over-all business of the plaintiffs is prospering. While

they have lost some distributors during the past two years, they have replaced them and added new ones so that the total number of their distributors has increased."

The motion before the Court (served on February 17, 1967, and denied on September 20, 1967) is similar to the motion for a preliminary injunction which was served on September 25, 1964. This motion was denied by Judge Caffrey on June 28, 1965, after a two day hearing at which both sides introduced testimony of witnesses who were subjected to cross-examination, as well as affidavits.

His opinion contained the following conclusions (PPRA 51):

"I am not satisfied that plaintiffs have shown that Ford made the changes complained of for the purpose of aiding its own sales of factory-installed radios or to injure the business of plaintiffs and others similarly situated, nor that Ford's 1965 design changes substantially or unreasonably increased installation time in any event.

"Plaintiffs have also failed to prove that by reason of the conduct that has occurred thus far they have suffered anything remotely approaching irreparable damage. Their protestations have been loud and long and their proof soft and short. They have not clearly shown what financial changes they have suffered since the beginning of the 1965 car season. They have not shown that whatever these consequences may be they are proximately caused by any wrongful conduct of defendant. They have not shown what, if any, effect the conduct complained of has had on their employee situation, and they admit that they have not lost any one of their fifty distributors."

The opinion of the Court of Appeals, affirming Judge Garrity's denial of the preliminary injunction, states "We dispose of this appeal on the narrow ground that Automatic

has made no compelling case of immediate irreparable injury". (Petition, Appendix B, p. 18a.)

On pp. 8-9, *infra* we demonstrate that these findings are amply supported by evidence.

ARGUMENT

A.

The Petition Should Be Denied Because Both Of The Courts Below Correctly Found That Petitioners Have Shown No Danger Of Immediate Irreparable Injury.

Section 16 of the Clayton Act (15 U.S.C. §26) provides for injunctive relief in antitrust cases

> " . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: . . ."

It is, of course, fundamental that to obtain a preliminary injunction the moving party must sustain the burden of showing that it will suffer irreparable and immediate damage for which it cannot be adequately compensated unless a preliminary injunction is granted and that a showing of loss of sales is not sufficient to meet the burden. See, for example, *Foundry Services, Inc.* v. *Beneflux Corp.*, 206 F. 2d 214 (2nd Cir. 1953).

The findings of the District Court and the Court of Appeals are well supported by the evidence.

In fact, plaintiffs have not shown that there has even been any substantial loss of sales which can be attributed to the instrument panel changes.

In 1965, plaintiffs named 15 Ford dealers who they claimed had refused or declined to purchase their radios on account of instrument panel changes. Of these only two stated that the panel changes had influenced their purchases of plaintiffs' radios, and in each of these cases it appeared that, had the dealer realized how little time was required to install radios in the 1965 Ford and Fairlane, he probably would have bought radios from someone to install himself. (DPRA 80, 84.)

In March, 1967, plaintiffs listed 25 Ford and Mercury dealers who they claimed had refused or declined to purchase their radios on account of the panel changes complained of. All except one denied that he refused or declined to purchase plaintiffs' radios on account of the instrument panel changes. (DPRA 148, 150, 153, 156, 161, 163, 168, 172, 174, 176, 177, 179, 180, 183, 185, 187, 189-190, 193, 195, 198, 199, 200-201, 202, 204.) That one said that the instrument panel change was a "minor factor" in the decrease in the number of Automatic radios purchased by his dealership for Fords and Fairlanes. (DPRA 203.)

As for plaintiffs' alleged losses, their losses in the manufacture and sale of their radios for the Mercury and Comet lines have actually decreased since the panel changes occurred in those cars, as is revealed by consolidating the "profit on sales" figures of Automatic Radio Sales, Inc. on these lines with the "loss on Ford operations" figures given for the manufacturing company. (Compare DPRA 123 and DPRA 127 combined, and DPRA 125 and DPRA 129 combined, with DPRA 130; and compare DPRA 125 and

DPRA 129 combined with DPRA 126 and DPRA 130 combined.*)

Although plaintiffs' sales of radios for the cars in which the instrument panels have been changed have decreased, this is true also of sales of radios for Ford-built cars in which there have been no changes in the instrument panels. (DPRA 117.) There has been a similar decrease in plaintiffs' sales of radios for cars of other manufacturers. (DXRA 120, 122.)*

Consideration of the evidence just referred to demonstrates that the Court was correct in finding "that plaintiffs have thus far failed to establish a causal relationship between dashboard changes and plaintiffs' declining sales" (Petition, Appendix B, p. 11a) and that the same is true of their alleged losses.

As pointed out above, both the courts below found as a fact that plaintiffs had not shown immediate irreparable injury. This case consequently presents a situation like those in which this Court has stated and applied the principle that it will not reverse findings of fact made by two courts below, in the absence of very exceptional showing of error. Thus in *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211 (1948), the Court said (p. 214):

> "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. *Stuart* v. *Hayden*, 169 U.S. 1; *Brainard* v. *Buck*, 184 U.S. 99; *First National Bank* v. *Littlefield*, 226 U.S. 110; *Baker* v. *Schofield*, 243 U.S. 114; *Second Russian Insurance Co.* v. *Miller*, 268 U.S. 552; *Texas & N. O. R. Co.* v. *Brotherhood of Clerks*, 281 U.S. 548; *Page* v. *Arkansas Natural Gas Corp.*, 286 U.S. 269; *Pick Mfg. Co.* v. *General Motors Corp.*, 299

*These figures are analyzed in detail in Appendix, pp. A-4–A-6, *infra*.

U.S. 3; *Virginian R. Co.* v. *System Federation,* 300 U.S. 515; *United States* v. *O'Donnell,* 303 U.S. 501; *Anderson* v. *Abbott,* 321 U.S. 349; *Allen* v. *Trust Co.,* 326 U.S. 630; *United States* v. *Dickinson,* 331 U.S. 745. . . ."

In *Allen* v. *Trust Company of Georgia,* 326 U.S. 630, 636 (1946), the Court said of findings of the two courts below,

"Those findings, being concurrent findings of the two lower courts, will be accepted here without re-examination of the evidence. See *United States* v. *O'Donnell,* 303 U.S. 501, 508 and cases cited."

This Court said in *United States* v. *Johnston,* 268 U.S. 220, 227 (1925):

"We do not grant a certiorari to review evidence and discuss specific facts."

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949), this Court said:

"A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. . . ."

See also: *Virginia Airmotive, Ltd.* v. *Canair Corp.,* 5 Trade Reg. Rep. §72, 407 (4th Cir. 1968).

Here it would be an understatement to say that the findings are not clearly wrong. In view of the evidence referred to above and on pp. A-3-A-6, *infra* it is obvious that they were clearly right.

B.

THE HOLDING BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

The Petition asserts in effect that the decision of the Court below applies criteria which conflict with those applied by the Court of Appeals for the Third Circuit in *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F. 2d 725 (1962), and in *Bateman* v. *Ford Motor Co.*, 302 F. 2d 63 (1962), and by the Court of Appeals for the Second Circuit in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738 (1953).

Neither the decision of the Court of Appeals in the case at bar nor the criterion applied by it is in conflict with any of these cases. None of those cases held that an appellate court should reverse a judgment denying a preliminary injunction based upon a finding that plaintiff had failed to prove that there was danger of immediate irreparable injury.

In the *Bergen* case, *supra*, the Court of Appeals held that a preliminary injunction should be granted because, *inter alia*, plaintiff was a "full-line, full-service wholesaler", many of defendant's products were "not otherwise available", and were indispensable to the operation of the businesses of plaintiff's customers, who were retail pharmacists, and who would shift their purchases to another wholesaler able to meet all their needs in one order if plaintiff could not supply them.

No such situation is presented in the case at bar. Plaintiffs are not dependent in any way upon defendant as a supplier. Plaintiffs here manufacture their own radios, and it does not appear that they ever obtained any radios or radio parts from defendant. It does not appear, and it is not a fact, that plaintiffs were full-line, full-service wholesalers. As the Court of Appeals properly found, dealers

decide whether to buy radios from plaintiffs' distributors largely on the basis of price. (Appendix B to Petition, p. 19a.) Moreover, it does not appear that plaintiffs' failure to manufacture and sell radios for certain models has impaired their sales of radios for car models which they do make. Furthermore, neither plaintiffs' nor defendant's radios are indispensable to the operation of a car dealership. There is no finding and, we submit, no evidence to support a finding that defendant's practices which are complained of were instituted "by a feeling of resentment" or to stifle the main action, or to achieve a monopoly, as was found in regard to defendant's conduct in the *Bergen* case.

Other elements relied upon in the *Bergen* case are also absent here. As the Court of Appeals in our case said, in distinguishing the *Bergen* case (Appendix B to Petition, p. 19a):

> ". . . Automatic's immediate customers are distributors who sell to dealers, who, in turn, seek Automatic's product because it is a lower cost product, yielding them a greater profit. This is not the situation faced in cases like *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F. 2d 725 (3d Cir. 1962) or *McKesson & Robbins, Inc.* v. *Charles Pfizer & Co.*, 235 F. Supp. 743 (E. D. Pa. 1964), where inability to supply 'a full line' of products causes the purchaser to shift his business permanently to other suppliers. Here all non-Ford suppliers are treated alike."

The *Bergen* case was also distinguished in *Hutchinson* v. *American Oil Products*, 221 F. Supp. 728 (E. D. Pa. 1963), on the ground, *inter alia*, that there was no showing in that case that plaintiff could not obtain all of his requirements from suppliers other than the defendant. In denying plaintiff's motion for a preliminary injunction, the court there stated (p. 732):

> "The heavy burden resting upon a plaintiff in establishing the right to a preliminary injunction has been frequently

emphasized by the United States Court of Appeals for the Third Circuit. See Madison Square Garden Corp. v. Braddock, 90 F. 2d 924 (1937); Joseph Bancroft & Sons Co. v. Shelley Knitting Mills Co., 268 F. 2d 569 (3rd Cir. 1959). In the Madison Square Garden Corp. case, supra, the court said 90 F. 2d at page 927:

> 'It has been well stated that upon an application for a preliminary injunction to doubt is to deny'."

The *Bateman* case cited in the Petition holds merely that a judgment for damages is not the exclusive remedy under the Automobile Dealer Franchise Act and that a District Court has jurisdiction in equity to enjoin a defendant from cancelling a franchise agreement in bad faith in violation of that Act. There the Court of Appeals did not hold that an injunction should be granted, but simply remanded the case for further proceedings in view of the fact that the District Court denied a preliminary injunction on the ground that the statutory right to damages was exclusive.

The facts in the *Hamilton* case, *supra*, were entirely different from those in the case at bar. The Court of Appeals in that case said of the findings of the court below "we cannot possibly declare them 'clearly erroneous', we must therefore accept them on this appeal". (206 F. 2d at p. 740.) The ultimate holding in that case was simply that the District Judge in granting a motion for a preliminary injunction "surely did not 'abuse' his discretion". (206 F. 2d at p. 743.) The District Judge enjoined defendant from voting stock of a competitor which it had acquired, finding that the purchase of the stock "very probably" violated §7 of the Clayton Act. (206 F. 2d at p. 740.) There is no finding in the case at bar that Ford's practices have violated any provision of the antitrust laws.

The petition relies upon the following language of Judge Frank in the *Hamilton* case:

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." (206 F. 2d at p. 740.)

The Second Circuit in the *Hamilton* case did not hold that it was unnecessary for plaintiff to show "that the danger of irreparable loss or damage is immediate." Indeed the District Court found (114 F. Supp. at p. 314) that "Hamilton will be irreparably damaged" if a preliminary injunction were not granted.

The Court of Appeals and the District Court in our case did not rule that plaintiffs' right to a final decision, after a trial, "be absolutely certain, wholly without doubt" in order for a preliminary injunction to issue. Indeed, as the Court of Appeals made clear in its opinion, it disposed of "this appeal on the narrow ground that Automatic has made no compelling case of immediate irreparable injury." (Petition, Appendix B, p. 18a.)

It is noteworthy that later decisions of the Court of Appeals for the Second Circuit laid down and applied the following principles:

> "A preliminary injunction is an extraordinary equitable remedy and it will be granted only upon a showing by the applicant that it will probably succeed on the trial and that it will suffer irreparable injury if the defendant is not restrained from certain activity pending the

trial. . . . " *Imperial Chemical Industries, Ltd.* v. *National Distillers & Chemical Corp.*, 354 F. 2d 459, 461-462 (1965).

In *W. E. Bassett Company* v. *Revlon, Inc.*, 354 F. 2d 868 (1966), the Court of Appeals for the Second Circuit applied the established principle that a preliminary injunction may not issue without a showing of probable success after trial and immediate and irreparable injury. It stated at pages 871 and 872 of the opinion:

> "A critical factor in the granting of such an injunction against an alleged trademark infringer is whether it is reasonably probable that the plaintiff will prevail after trial.
>
> * * *
>
> "Having established the likelihood of eventual success on the merits of its infringement suit, Bassett must also show that the denial of a preliminary injunction would cause it irreparable injury. See Foundry Services, Inc. v. Beneflux Corp., 206 F. 2d 214 (2 Cir. 1953)."

See also *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union*, 292 F. 2d 61, 70 (2d Cir. 1961), in which the Court said of the language of Judge Frank in the *Hamilton* case quoted above:

> ". . . the language quoted from Judge Frank's opinion must be taken along with the beginning of the sentence, 'To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt,' and the statement that the Court could not 'possibly' declare the District Court's substantive findings of probable Clayton Act violation to have been clearly erroneous."

There is thus no conflict presented here.

C.

THERE ARE OTHER INDEPENDENT GROUNDS SUPPORTING THE ORDER BELOW.

Apart from the findings of both courts below that plaintiffs failed to show danger of immediate irreparable injury, there are other independent grounds which require denial of the injunction sought by plaintiffs.

1. The requested injunction would be mandatory in character.

As we have shown above, the injunction sought would be mandatory, not only because it would require defendant to change its forms for orders but also because it would require defendant to do what neither it nor any other automobile manufacturer has ever done — supply automobiles in an unfinished condition (pp. 3-4 *supra*). We point out below the damage to defendant which such a practice would entail.

It is well settled that, as is stated by the Court of Appeals for the Fifth Circuit in *Miami Beach Federal Savings and Loan Ass'n.* v. *Callander,* 256 F. 2d 410, 415 (1958):

> "A mandatory injunction of this nature, especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party."

See also *Joseph Bancroft & Sons Co.* v. *Shelley Knitting Mills, Inc.,* 268 F. 2d 569, 574 (3rd Cir. 1959), and 43 C.J.S., *Injunctions,* pp. 412-413.

The case at bar is not a rare instance "in which the facts and law are clearly in favor of the moving party." On the contrary, there is no basis in fact or law for granting a mandatory preliminary injunction.

2. Defendant would be injured materially if the requested injunction were granted.

If the requested injunction were granted, defendant would be required on a dealer's request to deliver Ford, Fairlane and Comet cars with uncovered openings in the instrument panels.

The appearance of passenger cars, both interior and exterior, vitally affects their salability. As the instrument panel is so prominent its appearance is particularly important. (DPRA 110.)

If the requested preliminary injunction were granted, defendant would be placed at a competitive disadvantage with other manufacturers in the marketing of its Ford, Fairlane, Mercury and Comet cars without radios. This is because the requested injunction would compel defendant to sell such cars in an unfinished condition with instrument panels having large and unsightly radio openings in them through which unsafe, unsightly and distracting instrument panel lights would shine at night and through which wiring, bracketry and heater and air conditioning components would be seen. (DPRA 107-110; DXRA 62-63.)

In an actual test of such a car in the dark room of defendant's Technical Service Laboratory in Michigan, distracting and unsightly light leakage was observed from the instrument cluster, ash tray, heater and air conditioning controls on the 1967 Mercury; from the instrument cluster and the ash tray in a partially or fully opened position in the Comet; from the instrument cluster, clock and heater controls in the 1967 Ford; and from the instrument cluster and the heater controls in the 1967 Fairlane. (Affidavit of Oakes, para. 17, DXRA 62-63.)

Nor would an order that defendant must deliver cars in such a condition to dealers only "upon request" solve the

problem. It is and has been customary for many of defendant's dealers to order substantial quantities of cars from defendant from time to time during each model year for their inventories, i.e. without having orders from their customers for these cars, and without knowing whether the cars would be sold with a radio or without a radio. (Affidavit of Redd, para. 3, DPRA 136.) Thus there would be no way of being certain that some dealers might not over-estimate their anticipated demand for cars with radios, be left with an inventory of cars with perforated finished panels factory-installed without radios, and offer them to customers in this unsightly and unsafe condition. (See affidavits of defendant's dealers McCarthy, DPRA 167, and Halpert, para. 5, DPRA 196, regarding the difficulty of accurately estimating, at the time of ordering cars, the number of cars that will be sold with radios.)

D.

The Decision Below, Affirming The Interlocutory And Discretionary Order Denying The Requested Preliminary Injunction, Does Not Merit Review By This Court.

The decision below turns solely upon an analysis of the particular facts which led the Court of Appeals to "dispose of this appeal on the narrow ground that Automatic has made no compelling case of immediate irreparable injury" (Appendix B to Petition, p. 18a).

In *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384, (1893) the Court said:

> "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

In *Hamilton-Brown Shoe Co.*, v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916), the Court said that lack of finality "of itself furnished sufficient ground for denial." Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-585 (1952).

This Court said in *Public Service Commission of Wisconsin et al.* v. *Wisconsin Telephone Co.*, 289 U.S. 67, 70 (1933),

> ". . . While an application for an interlocutory injunction does not involve a final determination of the merits, it does involve the exercise of a sound judicial discretion. That discretion can be exercised only upon a determination, in the light of the issues and of the facts presented, whether the complainant has made, or has failed to make, such a showing of the gravity of his complaint as to warrant interlocutory relief. . . ."

This case clearly does not present a question of Federal Law of general importance and applicability which warrants review by this Court. Unlike some others, it involves plaintiffs which "do not have a consumer-oriented enterprise in the sense that its sales depended upon consumer consciousness of its product's availability or non-availability". (Opinion of Court of Appeals, Appendix B to Petition, p. 19a.) Indeed, as found by the District Court, these are plaintiffs which "appear to make every effort to supply dealers with radios as indistinguishable in appearance as possible from those manufactured by defendant, with the result that a radio made by the plaintiffs may be installed at the same retail price without the consumer knowing or having any reason to inquire by whom it was manufactured." (Appendix B to Petition, p. 8a., footnote 2.)

CONCLUSION

The decision below was correct and there is no conflict between it and decisions of other Courts of Appeals. The case depends upon its particular facts, on which both courts below agreed. It involves an interlocutory order and a matter for the exercise of the District Court's discretion. No question of law of general importance and applicability is presented. Accordingly, the Petition for writ of certiorai should be denied.

Respectfully submitted,

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April, 1968.

APPENDIX

In view of what we have said on the preceeding pages, it is probably unnecessary to correct misapprehensions which may arise from reading the Petition. There are, however, several statements in it which ought not to go unchallenged.

In the Petition (pp. 6 and 7) is the following:

"For the immediate purposes of the present appeal, the sales practices in question are exemplified by Ford's marketing of its 1967 Galaxie, Fairlane, Deluxe Comet and Mercury models. Each of these models is offered to Ford dealers in two versions: one with an imperforate dashboard that will not accomodate a custom radio and the other with a dashboard designed and adapted to accomodate a custom radio. The version that will accommodate a custom radio is available to Ford dealers only when they buy a factory-installed radio from Ford. To remain in competition with Ford, petitioners have been obliged to have radio dashboards manufactured for them, so that they can be furnished free of charge to Ford dealers who buy petitioners' custom radios. Petitioners have not been able to obtain these dashboards, which are costly, in the first quarter of the Galaxie and Fairlane model years, nor indeed at all for the Mercury or Custom Comet models. Thus as a result of Ford's tied marketing practices they have been wholly debarred from the Mercury and Custom Comet markets, debarred from an important part of the sales season for the Galaxie and Fairlane markets, and subjected to enhanced costs which haye caused their dwindling sales of Galaxie and Fairlane custom car radios to be made at a serious out-of-pocket loss (Appellants' R.A. 64, 65, 66, 135*).

*These are references to affidavits of plaintiffs' president. The quoted statements are otherwise unsupported by the record.

Moreover, they incur severe injury to their good will and reputation as suppliers of a complete line of custom automobile radios for new cars (Appellants' RA 128, 131, 138)."

Ford does not offer the models mentioned "in two versions". None of these models has "an imperforate dashboard that will not accommodate a custom radio". It is not necessary "to have radio dashboards manufactured for them". (DPRA 106.) In addition to the radio and supporting parts, all that is necessary for its complete and attractive installation in any of these models is an ornamental plastic or metal cover for the dashboard (which is more accurately called an "instrument panel"). This cover is either an ornamental mask and lens or an ornamental finish panel.

Ford makes these cover panels available at the following prices — $6.05 for Ford cars, $5.00 for Fairlane cars, and $7.67 for Comet and Mercury cars. (DPRA 113.) As plaintiffs' distributors have sold radios for these cars at prices substantially less than defendant charges for its radios (DPRA 75, 80, 82, 84, 88, 149, 152, 154, 158, 164), dealers can purchase plaintiffs' radio and defendant's cover plate and still pay less than if they purchase the radio from defendant. Dealers generally charge customers the same price for plaintiffs' radio as for defendant's. (Opinion of Court of Appeals, Appendix to Petition, p. 18a; DPRA 149, 152, 155, 159, 162, 166, 170, 172, 182, 184-185, 194, 196, 200, 205.)

One of the principal reasons why some Ford dealers have ceased purchasing or reduced their purchases of plaintiffs' radios is, as found by Judge Garrity, "probably the current shortage of trained mechanics and service stalls and dealers' consequent preference for factory-installed equipment". (Appendix to Petition, p. 11a; see

DPRA 140-141.) It appears that the reasons why some Ford dealers have purchased fewer of plaintiffs' radios than before are dissatisfaction with them and their customers' complaints after finding that the radios were not defendant's and that defendant's warranty does not apply to them. (DPRA 82, 98, 101, 151, 156, 158, 169, 178, 184, 186, 187, 201, 202.)

Both Judge Caffrey and Judge Garrity found that plaintiffs had failed to establish that their declining sales were due to the changes in the covers of the instrument panels. Thus Judge Caffrey found that there was "no significant causal relationship between the interior changes in the Galaxies and Fairlanes and the increased percentage of cars being sold . . . with factory-installed radios . . . ." (PPRA 50.)

Similarly, Judge Garrity found that plaintiffs "presented virtually no proof to connect [their] losses with conduct of the defendant" (Petition, Appendix B, p. 11a) and that "plaintiffs have thus far failed to establish a causal relationship between the dashboard change and plaintiffs' declining sales". (*Ibid.*)

Although there is evidence that plaintiffs' sales of radios for Ford cars (like their sales of radios for cars of other manufacturers) have decreased in recent years, it is clear that Ford dealers still buy substantial quantities of radios other than Ford radios for Ford made cars. (PPRA 117, DPRA 148-205.) Plaintiffs' brief makes no reference to the fact, established by affidavits of numerous Ford dealers, that the decrease in their purchases of plaintiffs' radios was due to other factors, such as complaints about and the inferior quality of Automatic radios, difficulty in having repairs made on them, etc. (See, for example, DPRA 153, 156, 158, 169.) These Ford dealers were all named by plaintiffs themselves as those whom they thought would be most likely to state that the decrease in their purchases was

due to changes in the instrument panels. (DXRA 115-116, 154-155.)

The delay of plaintiffs in getting their radios on the market is attributed by them to difficulties in retooling and procuring the parts made necessary by the instrument panel changes. But the plaintiffs admit that they have never attempted to obtain the necessary parts for the 1967 Mercury or Deluxe Comet (DXRA 117-118), and plaintiffs' officer in charge of sales has admitted that changes by automobile manufacturers in the design of their radios and instrument panels are common in the industry, and that such changes in design have often delayed plaintiffs in getting their custom radios on the market even for car lines employing the so-called "knockout" type of radio cover plate. (DXRA 139, 142-146.)

Moreover, it appears that plaintiffs have had a loss on radios for Ford cars in every year for which they have provided information, including the year ending September 30, 1964, *before any changes in the covers for the instrument panels.*

Combining the "profit on sales" experienced by Automatic Radio Sales, Inc. (DPRA 123) with the "loss on Ford operations" shown by the manufacturing company (DPRA 127) results in a consolidated figure shown an overall loss of $16,049 for the year ending September 30, 1964, for the total Ford line of plaintiffs' radios. This fiscal year ended about the time when the changes in the instrument panels complained of by plaintiffs first occurred. In that fiscal year, plaintiffs had an overall loss (combining the two companies) of $25,809 on sales of their Ford ("Galaxie") radios for defendant's cars with the conventional "knock out plates". (DPRA 123 and 127 combined.)

Furthermore, by combining the figures for the two plaintiff companies, we find that on their radios for Mercury

cars they had an overall loss of $1,577 in the fiscal year ending September 30, 1964 (DPRA 123 and 127 combined); $43,072 in the fiscal year ending September 30, 1965 (DPRA 124 and 128 combined); and $18,610 in the fiscal year ending September 30, 1966 (DPRA 125 and 129 combined), all of which preceded the panel changes in that car. They have experienced no loss on Mercury radios in 1967, after the panel changes, since they have not sold radios this year for that car! (DPRA 130.)

That there is virtually no relation between plaintiffs' alleged losses on the sales of their radios for defendant's cars and the instrument panel changes is indicated by the fact that on their sales of radios for Comet, the combined result for the two plaintiffs for the fiscal year ending September 30, 1964 was a profit of $4,216 (DPRA 123 and 127 combined), and in the next fiscal year a loss of $40,106 (DPRA 125 and 129 combined). (The change in the instrument panel of the Comet was not made until their introduction of the 1967 model in September, 1966. In the first half of the fiscal year beginning October 1, 1966, the combined loss of the plaintiffs on their sales for Comets was $19,409. (DPRA 126 and 130 combined.)

Defendant's Mustang has always had and continues to have a "knock out plate" type of instrument panel. Yet plaintiffs have suffered an overall loss in their combined sales of their radios for this model in each year for which they provide figures (beginning with the fiscal year ending September 30, 1964). (DPRA 123 and 127 combined, 124 and 128 combined, 125 and 129 combined, 126 and 130 combined.)

Similarly, on radios for defendant's Falcon, which has always employed a "knock out plate", plaintiffs have sold their radios at an overall loss in every fiscal year except 1964, when they made an overall profit of $6,661. (*Ibid.*)

Cougar is a new car introduced by defendant in September, 1966. It employs a conventional "knock out plate". Yet for radios for this model in the first half of the 1967 fiscal year plaintiffs had an overall loss of $13,435. (DPRA 126 and 130 combined.)

That plaintiffs' alleged difficulty in making a profit on their Ford radios cannot be attributed to the instrument panel changes is indicated by the following facts.

The unit costs of tooling and of making the parts for plaintiffs' radios, per radio, must of necessity increase as the number of units manufactured decreases. Plaintiffs have experienced an across-the-board decrease in their sales of car radios which has no significant relation to the instrument panel changes. Their sales of car radios appear to have decreased substantially for most models, regardless of whether any change was made in the instrument panels of those models. Plaintiffs' sales of radios for Mercury decreased from 2,112 in January-March 1965 to 954 in January-March 1966, although the change in the instrument panel did not occur until September, 1966. Their sales of radios for Falcon decreased from 6,822 in January-March 1964, to 651 in January-March 1967, even though this model still employs the "conventional knock out plate" instrument panel. (PPRA 117.)

There has been a similar decrease in plaintiffs' sales of radios for cars of other manufacturers. The total number of radios sold by plaintiffs for defendant's cars decreased in the first half of model year 1967 to 21,581 units from 39,723 units in the first half of 1966, and plaintiffs' sales of radios for General Motors cars decreased to 28,552 units from 36,934 units, for Chrysler cars to 27,420 units from 49,176 units and for American Motors cars to 1,754 units from 2,913 units. (DXRA 120.)

The Petition contains the following statements (p. 3):

"While petitioners sell custom car radios to dealers franchised by each of the automobile manufacturers, Ford dealers are petitioners' largest single market and constitute their only significant market for their most important group of products, i.e. radios designed and adapted for custom installation in the Ford line of cars".

This is misleading. Petitioners do not sell directly to Ford dealers. Their customers are independent distributors. (DXRA 1.) These distributors also sell products other than those of petitioners, and many hundreds of them do not even deal in custom radios. Moreover, petitioners manufacture and sell to their distributors many products other than Ford radios — not only radios for Chrysler, General Motor and American Motors cars, but also other types of radios and other products, such as tractor radios, portable radios, air conditioners, power brakes, ignition systems, stereo tape players and reverb speakers. (DXRA 129-130.)

There is no evidence that plaintiffs lost a single distributor on account of anything which defendant has done, and as said by Judge Garrity "the over-all business of the plaintiffs is prospering. While they have lost some distributors during the past two years, they have replaced them and added new ones so that the total number of their distributors has increased." (Appendix B to Petition, p. 12a; see DXRA 108-114.)

The Petition contains the following statement (pp. 12-13):

"In the opinion of the First Circuit in the present case, no question is raised as to the legal sufficiency of the charges made in petitioners' complaint or as to the adequacy of the evidence of antitrust violation in the affidavits and other documentary evidence submitted by petitioners in the district court."

This not so. The opinion of the Court of Appeals contains the following statement:

> ". . . the allegations and affidavits are not such as to convince us of such a strong probability of success on the merits that we should apply a less stringent requirement of proof of irreparable injury." (P. 18a of Appendix B to the Petition.)

Note also the following extracts from the opinion of Judge Garrity:

> ". . . plaintiffs have not established by evidence offered on the pending motion (a) that the defendant's marketing practice of supplying imperforate dashboards unless radios have been factory-installed is equivalent to an illegal tying arrangement, this being an unresolved question which must be more fully developed both factually and legally at the trial . . ." (P. 13a of Appendix B to Petition.)

In 1965, Judge Caffrey ruled that "the evidence which plaintiffs have adduced at this hearing does not lay a sufficient predicate for any finding that Ford may have violated Section 2 of the Sherman Act". (PPRA 52.) This is still true today.

There is no finding in any of the three opinions of the courts below to support the assertion in the Petition (p. 2) that defendant's practices "are giving the defendant a complete, unchallenged monopoly" in the market for radios for Ford cars. The assertion is erroneous argument and not a statement of fact. See Redd's affidavit (DPRA 234-235).

The Petition asserts (p. 13) that "the uncontested facts of Ford's increase in radio sales with the adoption of new dashboard marketing practices and of petitioners' decline in sales are themselves the clear evidence of causation", and it goes on to argue that a jury could conclude that "defendant's wrongful acts" caused damage to plaintiffs.

This statement, however, overlooks the conclusions of the Court of Appeals quoted on pp. 6-7, *supra,* and the conclusion of Judge Garrity quoted on p. 5, *supra.*

Note also the conclusion of Judge Caffrey that there was "no significant causal relationship between the interior changes in the Galaxies and Fairlanes and the increased percentage of cars being sold . . . with factory-installed radios". (PPRA 50.) Judge Caffrey found that "the percentage of factory-installation of car radios in the 1965 models through March 31 of this year has increased in very many, if not all, of the major makes of automobiles which are delivered equipped with the conventional knockout plate". (*Ibid.*) He then went on to compare the increase in factory-installation rates in various models of cars employing the conventional instrument panels with those in the Ford and Fairlane, and found them to be comparable. (*Ibid.*)

The radio cover plates complained of were the product of Ford stylists and were decided upon in order to improve the appearance and quality of the panels and in the case of some cars to save costs as well. (DPRA 206-215.)

MAY 9 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1279

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR CO., *Respondent*

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Consistently with the limitations proper to certiorari proceedings, petitioners will rely upon the statement of the case, the arguments and the authorities set forth in their petition, which in their view are accurate, fair and valid. Accordingly they will confine their reply to two significant points:

1. Ford relies exclusively on *Foundry Services* v. *Beneflux Corp.*, 206 F.2d 214 (2d Cir. 1953), to support

its contention that a showing of loss of sales* is not sufficient to establish irreparable injury for which a plaintiff cannot be adequately compensated unless a preliminary injunction is granted (Respondent's Brief, p. 7). *Foundry Services* is a Second Circuit holding by a split panel in a diversity case (Learned Hand, J., dissenting on the point here in issue), apparently declaring a New York State rule governing injunctions, and moreover a State rule which another Second Circuit panel declined to follow a few months later. See *Franke* v. *Wiltschek,* 209 F.2d 493 (2d Cir. 1953), particularly page 507, footnote 22, in the dissenting opinion of Judge Frank, where, in discussing *Foundry Services,* he said:

> That case was brought in the federal court in New York, with jurisdiction based on diversity of citizenship. The court did not discuss any New York authorities. If my colleagues' opinion in the instant case is correct, then, if it were the rule in New York that a temporary injunction would always issue in such a case, the decision

* It cannot be seriously disputed that petitioners' sales have been greatly reduced by Ford's dashboard tie-in practices. During the six-months period ending March 31, 1967, petitioners' sales of custom radios for Ford cars had declined by 80 percent from the level obtaining in 1962 before the tie-in practices began. In contrast, during the same period sales of petitioners' custom radios for General Motors and Chrysler cars, wherein only limited dashboard tie-in problems were encountered, were reduced only 36 percent and 27 percent respectively below their 1962 levels. See Affidavit of Sidney M. Lerner, Robert R. Nathan Associates (Appellants' RA 126-134) as corrected in open court by Mr. Lerner at page 8 of the June 26, 1967 hearing transcript (Plaintiffs' Xeroxed Record Appendix). Moreover, Ford's argument either ignores or treats as mere loss of sales petitioners' uncontroverted showing that they have been completely excluded from the Mercury and Comet radios markets by Ford's tied selling practices (Appellants' RA 64, 70, 135).

in the Foundry Services case would have been wrong.

Reliance by Ford on such weak and ambiguous authority strongly endorses the need for this Court to declare the standards which should govern interlocutory relief in private antitrust litigation. At the least it evidences the lack of any broad authoritative holding on this important matter.

2. Ford argues that the Court should deny this petition because the case is at an interlocutory stage. This argument, if it were valid, would preclude the Court from ever passing upon the important question here presented, viz., what standards govern interlocutory relief in private antitrust litigation under Section 16 of the Clayton Act (15 U.S.C. § 26). The short answer to the argument is that the Court should grant the petition if, and because, it presents a question of federal law of general importance and broad applicability upon which this Court has not ruled and upon which courts of appeals have divided.

Respectfully submitted,

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Dated: This 9th day of May, 1968